87-1590

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

HARRY SAGANSKY,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MORRIS M. GOLDINGS
Counsel of Record
MAHONEY, HAWKES & GOLDINGS
One Walnut Street
Boston, Massachusetts 02108
(617) 367-2900
Counsel for Petitioner

Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

I.

QUESTIONS PRESENTED

1. Where renewed imprisonment of a ninety-year-old civil witness contemnor in precarious medical condition will cause further and foreseeable deterioration of his health and his likely death, do the Fifth Amendment protection of substantive due process, the Eighth Amendment prohibition of cruel and unusual punishment, and the Recalcitrant Witness Statute require an alternative to coercive prison confinement?

2. Does the Fifth Amendment require, as a matter of procedural due process, that a district court consider medical reports as to the physical condition of a ninety-year-old civil witness contemnor and the likely effect on his condition of renewed prison confinement before ordering further and probably fatal imprisonment?

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The Petitioner, Harry Sagansky, respectfully petitions that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the First Circuit, entered on February 24, 1988.

Opinions Below

The opinion of the Court of Appeals for the First Circuit, the review of which is sought by this Petition, is unreported and is reprinted in the appendix attached hereto, App. 1-2.

An accompanying opinion of the Court of Appeals for the First Circuit, marked "Not for Publication" and concerning an issue of unlawful electronic surveillance, the review of which is not sought, is reprinted in the appendix attached hereto, App. 3-8.

The initial unreported decision on February 8, 1988 of the United States District Court authorizing and ordering a medical examination of the Petitioner by a doctor selected by the Government, and an unreported decision of February 11, 1988, of the District Court rescinding the February 8, 1988 decision, are reprinted in the appendix attached hereto, App. 9; App. 10.

Jurisdiction

The Memorandum and Order of the First Circuit Court of Appeals, the review of which is sought herein, was entered on February 24, 1988. On February 29, 1988, Mr. Justice Brennan granted an Application to Stay that Order pending this Court's consideration of the instant Petition for Writ of Certiorari, to be filed by March 25, 1988, App. 15.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions and Statute Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Eighth Amendment to the Constitution of the United States provides in pertinent part as follows:

> Cruel and unusual punishment [shall not be] inflicted.

The statute regarding confinement of recalcitrant witnesses, 28 U.S.C. §1826, provides in pertinent part as quoted below, footnote 1. It is reproduced in full in the Appendix attached hereto, App. 14.

Statement of the Case

The Petitioner is a ninety-year-old man in precarious medical condition who has been ordered to submit to renewed coercive imprisonment, despite unrefuted medical reports attesting that such confinement in prison, even in a medical prison facility, will prove damaging to his health and is likely to be fatal. The Government argued that the Petitioner's medical condition was irrelevant. The District Court agreed with the Government. On appeal, the First Circuit Court of Appeals held that it saw no constitutional impediment to confining the contemnor in a medical prison facility, regardless of what effect that will foreseeably have on his health and his life itself, and therefore ordered his renewed imprisonment without a prior consideration of whether his death will likely result.[1]

The contemnor's position is that in these circumstances the Recalcitrant Witness statute allows and the Fifth Amendment requires that a judicial determination be made, *prior* to confinement, as to the likelihood of deterioration of health of the contemnor — and the likelihood of his death — upon renewed imprisonment. If it is likely, as attested in the only medical evidence in the case, that his health would deteriorate and that death would occur, the contemnor argues, the Fifth and Eighth Amendments and the Recalcitrant Witness statute require that an alternative to coercive prison confinement (such as house arrest) be employed.

Harry Sagansky was incarcerated pursuant to 28 U.S.C. § 1826 on January 6, 1988, for civil contempt after refusing to testify before a grand jury. He was released on personal recognizance on January 26, 1988, pending appeal to the First Circuit Court of Appeals on a claim of unlawful electronic surveillance.

---

[1] Imprisonment of civil contemnors is pursuant to the Recalcitrant Witness statute, 28 U.S.C. § 1826, which provides in pertinent part as follows:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify . . . the court . . . may summarily order his confinement *at a suitable place* . . . (emphasis added)

On February 3, 1988, the First Circuit preliminarily rejected that claim and remanded the case to the District Court for reconsideration of the question of bail pending appeal. On February 5, 1988, the Government filed a Motion To Revoke Bail. On that date, the District Court granted the Government's Motion *ex parte*, ordering the contemnor to surrender to the United States Marshal's Service on or before February 8, 1988. On February 5, 1988, the contemnor filed a Motion To Stay Order Revoking Bail, arguing that, as stated in a medical report of that date furnished to the District Court, App. 11-12, his fragile medical condition had deteriorated as a result of his incarceration, and that renewed incarceration would result in further foreseeable deterioration and possible *death*.

The medical report noted that "the witness fell in prison and struck his head" and described his medical condition, stating, *inter alia:*

> He was brought directly from prison on January 26th complaining of weakness, lightheadedness and weight loss. He fell in prison and struck his head. On my exam, I noted a marked deterioration in his overall health. He was lethargic, dazed, and listless. His gait was hesitant and awkward.
>
> App. 11 (emphasis added)

The report concluded:

> *I feel certain that Dr.*[2] *Sagansky's recent stay in prison caused a definite deterioration in his precarious medical condition.* His underlying medical condition such as brain atrophy, hypothyroidism and fluid retention could lead to a major medical setback if there is any profound change in his environment. While Dr. Sagansky's current condition does not warrant hospitalization, he does need close medical follow-up by the physicians most familiar with his case.

[2] Harry Sagansky received a doctorate in Dentistry and is sometimes referred to as "Doc" or Dr. Sagansky.

> *I believe that Dr. Sagansky's recent prison experience caused a dramatic decline in his overall health* which has, in part, been reversed within the past week at home. *I believe that further exposure to prison will be a clear hazard to Dr. Sagansky's health.*
>
> App. 11-12 (emphasis added)

A report of another doctor that had been furnished the District Court prior to incarceration had included:

> In view of the multiplicity and seriousness of his medical conditions, it is my opinion that incarceration would certainly have a deleterious effect on his health, and indeed might even prove to be *fatal*.
>
> App. 13 (emphasis added)

On February 8, 1988, the District Court allowed the Motion for stay of further commitment until a physician selected by the Government had a chance to examine the contemnor, authorized the Government to select a competent physician to perform such an examination, and ordered a report of such examination to be furnished to contemnor's counsel and the Court for consideration. App. 9. The Order of the District Court stated in full:

> February 8, 1988 — Motion allowed to the extent of staying the order until a physician selected by the government has a chance to examine the contemnor. The contemnor is directed to cooperate fully in such examination. This order authorizes the government to select a competent physician to perform such an examination. The report of such examination shall be furnished to contemnor's counsel and the Court forthwith and the Court will then consider the matter further with the entire record. William G. Young, U.S.D.J.
>
> App. 9.

The Government filed a Response to Contemnor's Motion for Stay and Court's Order on February 9, 1988, arguing that the medical situation of the witness was "irrelevant" and "not adequate reason to further stay the order of incarceration." The Government concluded that it therefore "declines to select a physician to examine the contemnor."

On February 11, 1988, the District Court rescinded its Order of February 8, 1988, and ordered the contemnor's bail revoked. App. 10. The Order of February 11, 1988, stated in full:

> February 11, 1988 — Upon further review and reflection on the entire record, the Court, agreeing with the argument expressed herein in the Government's Response, orders the contemnor's bail revoked and the contemnor shall either comply with the Court's order or surrender himself to the United States Marshal on or before 12 noon, Friday, February 12, 1988. The Marshal's Service shall cause the contemnor to be hospitalized should it appear to the Service that such hospitalization is necessary. William G. Young, District Court.
>
> App. 10

On February 12, 1988, the contemnor filed in the District Court a Motion for Medical Examination, and a Motion To Stay Order Revoking Bail pending an expedited appeal. The District Court denied these motions on February 12, 1988. On that date, the First Circuit granted the Contemnor's Motion for Stay Pending Appeal and Request for Expedited Appeal.

On February 24, 1988, the First Circuit dismissed the contemnor's appeal on the electronic surveillance claim, an issue not before this Court.[3] Also on that date the First Circuit concluded in a memorandum and Order that "[t]he district court

[3] A copy of that Opinion is reproduced in the Appendix attached hereto, App. 3-8.

must have the means to enforce its lawful order of contempt," and ruled that there was "no constitutional impediment" to the contemnor's incarceration even though a medical report stated that "incarceration could be life-threatening to him because of his advanced age (ninety years)." App. 1-2.[4]

On February 26, 1988, the First Circuit denied without opinion the contemnor's motion for a stay pending a Petition for Writ of Certiorari to this Court. On February 29, 1988, Mr. Justice Brennan granted Contemnor's Application To Stay Order of the United States Court of Appeals for the First Circuit and Order of the United States District Court for the District of Massachusetts pending Petition for Writ of Certiorari, App. 15. It is respectfully urged that the Writ be granted and this Court provide the lower courts with needed guidance on the important issues involved.

Reasons for Granting the Writ

THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE THE LOWER COURTS WITH NEEDED GUIDANCE REGARDING THE SUBSTANTIVE AND PROCEDURAL RIGHTS OF DUE PROCESS OF LAW OF CIVIL WITNESS CONTEMNORS WHO WILL FORESEEABLY SUFFER DETERIORATION OF HEALTH AND DEATH UPON IMPRISONMENT.

The First Circuit's Memorandum and Order is in startling conflict with the Fifth Amendment protections of due process of law and with the requirements of many due process decisions of this Court and all other federal courts of appeals. Further, exercise of this Court's supervisory power over the historic use of coercive sanctions for contempt is appropriate to prevent a serious departure from the usual course of judicial proceedings.[5] Certiorari should therefore be granted for the following "special and important reasons:"[6]

---

[4] It should be noted that the medical report indicated that incarceration could be life-threatening not because of his advanced age alone, but because of his age combined with his precarious medical condition. App. 11-12.

[5] Supreme Court Rules 17.1(a) and (c).

[6] Supreme Court Rule 17.1.

(1) The petition raises questions concerning fundamental and essential constitutional protections which the First Circuit Memorandum and Order denies to the Petitioner. This Court should grant Certiorari and provide guidance to the lower courts as to what substantive and procedural due process must be accorded a civil contemnor, charged with no crime, whose life is placed in jeopardy by coercive prison confinement.

(2) The issues and questions presented in this Petition are of considerable importance to the citizenry. First, any person may become a grand jury witness and subject to a sanction for civil contempt. Second, deliberate indifference to the precarious health of a civil contemnor by the Government and by the judiciary is inconsistent with the standards of a civilized society. Third, the imprisonment of a civil contemnor in deteriorating health, to await his testimony against targets of a grand jury, is likely — particularly if he dies in confinement while the targets roam the streets — to demean the judicial process and hold it up to Dickensian ridicule.

A. *Substantive Due Process: This Court Should Grant Certiorari and Determine Whether the Threat and Actuality of Lingering or Immediate Death Is Cruel and Unusual.*

The only two medical reports in evidence in this matter attested that confinement of this ninety-year-old witness, even in a medical prison facility, will *itself* and *per se* further deteriorate his precarious health and likely prove fatal, App. 11-12, App. 13, and that the twenty days already spent in prison in January, 1988, before release on recognizance had a damaging effect. App. 11-12.

The Government's argument is that the witness' medical condition is irrelevant. After first disagreeing, App. 9, the District Court agreed with the Government, App. 10. On appeal, the First Circuit held that despite the unrefuted medical evidence that any incarceration would likely prove fatal, it saw "no constitutional impediment to such confinement."

> We believe that confinement in a medical prison facility, whether in the federal, or in a local, facility answers the witness' health concerns and we see no constitutional impediment to such confinement.
>
> App. 2

This court should grant certiorari to determine and announce whether, given the conditions of the witness' age and health, there are in fact "constitutional impediments" to this type of coercion and confinement, and whether, where there are alternative forms and places of confinement available — including, for example, house arrest — the fact that he will die if incarcerated is irrelevant.

Not only the Constitution but the very statute under which the witness was ordered incarcerated give clear indication that the witness' substantive and procedural rights to due process of law have been violated. The Recalcitrant Witness statute, 28 U.S.C. §1826, authorizes but does not mandate confinement and allows specifically for confinement other than at a prison. Congress directed *not* that a court must order imprisonment of a recalcitrant witness, but rather that it "*may*. . . order his confinement *at a suitable place.*" App. 14. The legislative history provided in 1970 U.S. Code Congressional and Administrative News, p. 4007, 4022, states:

> [T]he court is authorized summarily to confine the witness *at a suitable place* until the witness is willing to give such testimony or provide such information. . . *The confinement is civil, not criminal*; its purpose is to secure the testimony through a sanction, *not to punish the witness by imprisonment.*
>
> (emphasis added)

It is thus explicit in the statute and its history that a prison facility is but one possible place for confinement. It is also implicit in the statute that where incarceration (even in a

medical prison facility) will prove fatal, a prison facility is not "a suitable place." Such an interpretation is made particularly apparent in light of this Court's recurring announcement that "only the least possible power adequate to the end proposed should be used in contempt cases." *Young* v. *United States ex rel. Vuitton Et Fils S.A., et al.*, 107 S. Ct. 2124, 2134 (1987); *United States* v. *Wilson*, 421 U.S. 309, 319 (1975); *Shillitani* v. *United States*, 384 U.S. 364, 371, n.9 (1966).

In *Estelle* v. *Gamble*, 429 U.S. 97, 105 (1976), this Court concluded that "[r]egardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury" is a violation of the Eighth Amendment as "incompatible with the evolving standards of decency that mark the progress of a maturing society." *Ibid.* at 102. Pretrial detainees are constitutionally entitled to the same protection against deliberate indifference to their medical condition as are convicted inmates. *Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 244 (1983); *Maddox* v. *City of Los Angeles*, 792 F.2d 1408, 1415 (9th Cir. 1986); *Garcia* v. *Salt Lake County*, 768 F.2d 303, 307 (10th Cir. 1985); *Whisenant* v. *Yuam*, 739 F.2d 160, 163 (4th Cir. 1984). Protection is accorded by the substantive provisions of the Due Process Clause as well as by the Eighth Amendment against cruel and unusual punishment. *Fernandez* v. *Leonard*, 784 F.2d 1209, 1215-1216 (1st Cir. 1986); *Garcia* v. *Salt Lake County*, *supra*; *Loe* v. *Armistead*, 582 F.2d 1291, 1294 (4th Cir. 1978). Having been neither convicted of any crime nor even charged with any crime, a civil contemnor in precarious medical condition has no less call upon due process protection by the Government's labeling his medical condition "irrelevant."

In *United States* v. *DeCologero*, 821 F.2d 39 (1st Cir. 1987), the First Circuit held that a convicted felon who claimed to be in "severe, chronic, disabling, and worsening medical condition," *supra* at 40, may nonetheless be incarcerated. That decision was grounded in reasons of public policy and squarely based on the petitioning party's status as a *convicted felon:*

> Persons forfeit a variety of freedoms in consequence of *proven criminality*.
>
> *Ibid.* at 42
> (emphasis added)

> Valid goals of sentencing — such as *punishment* and general deterrence — would be sharply eroded.
>
> *Ibid.* at 43

> Imprisonment is, under any circumstances, a rigorous ordeal. It may well be especially difficult for one whose health is impaired, whose activities are restricted, and whose pain is unremitting. Yet, poor health in and of itself should not automatically shield a convicted felon from his just desserts.
>
> *Ibid.* at 43
> (emphasis added)

That case is instructive by way of contrast: the witness here has been charged with no crime. If the witness here is to constitutionally receive any supposed "just desserts," these must be dealt through the normal criminal process, *not* the mechanism of civil contempt. Punishment for uncharged crimes is unconstitutional, and the purpose of confinement for civil contempt is to coerce compliance with the order of a court, *not* to punish.[7] *Local 28 of Sheet Metal Workers* v. *E.E.O.C.*, 106 S.Ct. 3019, 3033 (1986); *Shillitani* v. *United States*, 384 U.S. 364, 369-370 (1966); *United States* v. *United Mine Workers of America*, 330 U.S. 258, 303-04 (1947); *Gompers* v. *Bucks Stove and Range Company*, 221 U.S. 418, 448 (1911).

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[7] It is apparent that the Government is here seeking to extract, in effect, many pounds of flesh of the witness for uncharged crimes, as evidenced in the Government's Response to Court's Order, which concluded:

> When considering the equities of this situation, it should be recalled that the vast majority of the questions that will be asked of the 90-year-old witness will involve events that occurred when he was 89 and actively involved in a vast illegal gambling business that directly benefited and involved organized crime.

This Court should grant certiorari and determine whether the right to life[8] of a civil witness contemnor is substantially different than a convicted felon, and whether there is a constitutional "impediment" to the "lingering death"[9] condemned as cruel and unusual punishment in *Estelle* v. *Gamble*, *supra* at 103, and by "the drafters of the Eighth Amendment." *Ibid.*

B. *This Court Should Grant Certiorari and Determine What Procedural Process Is Constitutionally Due Before a Determination Is Made as to Whether and Where To Confine an Elderly Witness Contemnor in Precarious Health.*

The particular processes required by the Constitution with respect to the termination of a protected interest "vary depending upon the importance attached to the interest, and the particular circumstances under which the deprivation may occur." *Walters* v. *National Ass'n of Radiation Survivors*, 105 S.Ct. 3180, 3189 (1985); *Sanotsky* v. *Kramer*, 455 U.S. 745, 754-757 (1982); *Matthews* v. *Eldridge*, 424 U.S. 319, 332-335 (1976).

In *Parrat* v. *Taylor*, 451 U.S. 527, 538-539 (1981), this Court contrasted cases involving deprivation of property by the Government where a prior hearing was constitutionally required with those situations where only a postdeprivation hearing need be accorded. Situations where a prior hearing is required include the taking of the driver's license and registration of an uninsured motorist who has been involved in an accident, *Bell* v. *Burson*, 402 U.S. 535 (1971); the seizure of property in a debtor's possession, *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); and the deprivation of welfare benefits, *Bodie* v. *Connecticut*, 401 U.S. 371 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

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[8] The Government and the First Circuit contend that the issue is one of deprivation of liberty; the witness and the unrefuted medical reports contend that the issue is one of deprivation of life.

[9] Or a quicker death, given the witness' advanced age and precarious health.

It is recognized, however, that some circumstances may require the necessity of quick action or the impracticality of providing any meaningful predeprivation process. *Parrat* v. *Taylor*, *supra* at 539:

> In *North America Cold Storage Co.* v. *Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908), we upheld the right of a State to seize and destroy unwholesome food without a preseizure hearing. The possibility of erroneous destruction of property was outweighed by the fact that the public health emergency justified immediate action and the owner of the property could recover his damages in an action at law after the incident. In *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950), we upheld under the Fifth Amendment Due Process Clause the summary seizure and destruction of drugs without a preseizure hearing. Similarly, in *Fahey* v. *Mallonee*, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947), we recognized that the protection of the public interest against economic harm can justify the immediate seizure of property without a prior hearing when substantial questions are raised about the competence of a bank's management. In *Bowles* v. *Willingham*, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944), we upheld in the face of a due process challenge the authority of the Administrator of the Office of Price Administration to issue rent control orders without providing a hearing to landlords before the order or regulation fixing rents become effective. See also *Corn Exchange Bank* v. *Coler*, 289 U.S. 218, 50 S.Ct. 94, 75 L.Ed. 378 (1930); *McKay* v. *McInnes*, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975 (1929); *Coffin Brothers & Co.* v. *Bennett*, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 768 (1928); and *Ownbey* v. *Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921). These cases recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process. . . .

Also, in some instances, the critical circumstances might be predominantly economic.

> It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection . . .
>
> Friendly, J., "Some Kind of Hearing,"
> 123 U. of Penn. L. Rev. 1267, 1276 (1975).

In the instant case, involving the most important right, the right to life, there has been no argument of impracticality, cost, or required quickness of action.[10] Rather, the Government has argued that the state of the witness' health, and the reasonably foreseeable consequences of incarceration on not only his health but also his very life, are irrelevant. The District Court on second thought agreed with the Government, App. 10, as did the First Circuit, which held that post-incarceration "monitoring" in a medical prison facility of the witness' medical condition was all that he was entitled to:

> The witness' related request that the district court consider evidence of his medical condition and the alleged "foreseeable consequences" of incarceration is also effectively answered by an order confining him to a prison facility where the witness' medical condition will be monitored.
>
> App. 2

But while a "monitoring" of the witness' deteriorating health and likely death "effectively answers his request," it protects neither his substantive nor procedural rights. The requirement of §1826 that confinement be at a "suitable place" indicates that in cases such as this, consideration of rele-

[10] The medical examination and report to the court originally ordered by the District Court could readily be accomplished in a matter of hours.

vant medical evidence be considered *prior* to an incarceration that might kill him.[11] "The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.' " *Parrat* v. *Taylor*, 451 U.S. 527, 540 (1981), quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

It is respectfully urged therefore that the Petition for Certiorari be granted, and, as stated in *Parrat* v. *Taylor*, *supra* at 533-34, this Court "once more put our shoulder to the wheel hoping to be of greater assistance to courts confronting such a fact situation than it appears we have been in the past."

Directly relevant precedents do not appear to be reported, except for *In re Buonacuore*, 412 F.Supp. 904, 906-907 (E.D. Penn. 1976). In that case, the District Court declared that it had not abused its discretion precisely *because* it had determined as a result of a hearing held *prior* to incarceration *that incarceration would not endanger* the civil witness contemnor. It was this *prior* determination that accorded the contemnor his recognized substantive and procedural rights:

> I need not tarry long on Buonacuore's habeas petition — it seeks release on grounds which I *carefully considered* and rejected *prior to ordering his incarceration in the first place*, i.e., his health. Before holding Buonacuore in contempt, I received evidence at length about his gall bladder surgery and alleged coronary problems. *Disposition of the Government's motion was delayed until I was satisfied that recuperation following the surgery was complete and that incarceration would not endanger him.*
>
> * * *

[11] The witness' suggestion and Motion for an independent medical examination were in the interest of assuring a complete medical presentation to the District Court. The witness is, however, content to have the matter decided solely upon his own evidence. His minimal constitutional request is therefore merely that the Court consider evidence of his medical condition and the foreseeable consequences of renewed incarceration *before* he is further incarcerated and taken fatally ill.

> *Federal law, 28 U.S.C. §1826, plainly contemplates a relatively broad latitude in which a district judge may exercise his discretion in deciding whether to incarcerate a recalcitrant witness.* Here, because of the demonstrated need for Buonacuore's testimony, his refusal to testify in the face of a grant of immunity, and my conviction that whatever medical problems he might have could more than adequately be dealt with in the medical facilities in which I could direct that he be incarcerated, I opted to order his confinement. *Under such circumstances, my decision did not constitute an abuse of discretion* and the habeas petition raises no new question in this regard.
>
> (emphasis added)

Here, on the contrary, the *only* evidence in the case attests that renewed incarceration *will* endanger and likely kill the contemnor. In these circumstances, renewed incarceration, even in a medical prison facility, without a *prior* determination as to the suitability of that place of confinement *in such circumstances* plainly appears to be an abuse of discretion and the "deliberate indifference" condemned in *Estelle* v. *Gamble*, *supra*.

Both procedurally and substantively, therefore, this case appears to "shock the conscience," *Rochin* v. *California*, 342 U.S. 165, 172 (1952), and violate the Fifth Amendment. The "fundamental purpose [of contempt proceedings] is to preserve respect for the judicial system itself." *Young* v. *United States ex rel. Vuitton et Fils S.A., et al.*, *supra*. But the lingering or immediate death of a civil contemnor without even the benefit of a prior hearing or determination concerning his unrefuted precarious medical condition, unless addressed by this Court, will itself undermine such purpose and respect.

Finally, the result sought by this Petition is consistent with the historic role of courts in tempering the awesome power of the sanction of contempt. From its earliest days, the English

Courts of Chancery recognized that the contempt power, although absolute in theory, required moderation in practice. This philosophy resulted not only from a reaction to the excesses of the Star Chamber, but also from a recognition of the importance of maintaining respect for the courts in order to preserve their authority. See Berger, "Constructive Contempt," 19 U. Chicago L. Rev. 602, 605-614 (1942). The case at bar takes its place in a long line of decisions stretching back to Chief Justice Bereford in 1309. The Petitioner asks this Court, by granting the Writ of Certiorari, to proclaim to the courts below — and to the United States which is advocating the Petitioner's imprisonment — that jurist's classic judgment: "With what equity (look you) can you demand this penalty?" Y.BB. Edward II (Selden Society), ii. pp. xii, 59, cited in Plucknett, A Concise History of the Common Law, p. 677.

Conclusion

Therefore, for the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

Morris M. Goldings
Mahoney, Hawkes & Goldings
One Walnut Street
Boston, Massachusetts 02108
(617) 367-2900
Attorney for Harry Sagansky

United States Court of Appeals
For the First Circuit

No. 88-1111

IN RE
GRAND JURY PROCEEDINGS

HARRY SAGANSKY,
APPELLANT.

Before COFFIN, BOWNES and BREYER, *Circuit Judges.*

MEMORANDUM AND ORDER
Entered February 24, 1988

This grand jury witness was held in contempt of court for refusing to testify before a grand jury despite a grant of immunity pursuant to 18 U.S.C. § 6001 *et seq.* In a separate appeal, this court determined that the witness's claim of unlawful electronic surveillance was not just cause for refusing to testify. *In re Grand Jury Proceedings (Harry Sagansky)*, Nos. 88-1059, 88-1060. Section 1826(a) of Title 28 provides: "Whenever a witness in any proceeding before . . . [a] grand jury of the United States refuses without just cause shown to comply with an order of the court to testify . . . the court, upon such refusal . . . may summarily order his confinement *at a suitable place* until such time as the witness is willing to give such testimony . . . (Empahasis added.) In the present appeal, the witness argues that, based on information submitted by the witness' physician, incarceration could be life-threatening to him because of his advanced age (ninety years) and that, therefore, incarceration is prohibited by the Fifth and Eighth Amendments. The government has informed this court that the witness has been designated to the Federal Medical Prison Facility in Springfield, Missouri and that authorization has been received to transport the witness to

that medical prison facility via an air medi-vac plane, equipped with a nurse.

The district court must have the means to enforce its lawful order of contempt. We believe that confinement in a medical prison facility, whether in the federal, or in a local, facility answers the witness' health concerns and we see no constitutional impediment to such confinement. The witness' related request that the district court consider evidence of his medical condition and the alleged "foreseeable consequences" of incarceration is also effectively answered by an order confining him to a medical prison facility where the witness' medical condition will be monitored.

Lastly, we must not lose sight of the fact that, although the witness labels it a "cliche argument", it is, nonetheless, true that the witness, himself, holds the key to his freedom. The government is validly seeking his testimony, not his confinement, and none of the medical information suggests that the witness' appearance or testimony before the grand jury would be harmful to his health.

Appeal dismissed and the case is remanded to the district court which shall enter an order requiring the witness either to comply with that court's order to testify or to surrender himself for confinement in the medical prison facility designated by the district court.

Temporary stay of incarceration vacated.

By the Court,

FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Goldings and Auerhahn]

[NOT FOR PUBLICATION]

United States Court of Appeals
For the First Circuit

No. 88-1059

IN RE
GRAND JURY PROCEEDINGS

HARRY SAGANSKY,
APPELLANT.

No. 88-1060

IN RE
HARRY SAGANSKY,

UNITED STATES,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WILLIAM G. YOUNG, *U.S. District Judge*]

Before
COFFIN, BOWNES and BREYER,
Circuit Judges.

Morris M. Goldings and *Mahoney, Hawkes & Goldings*, on brief for appellant.

Frank L. McNamara, Jr., Unites States Attorney, *Jeffrey Auerhahn*, *Gregg L. Sullivan*, and *Jeremiah T. O'Sullivan*, Special Attorneys, U.S. Department of Justice, on brief for appellee.

Entered: February 24, 1988

Per Curiam. The appellant was held in contempt of court on December 22, 1987 for refusing to testify before a grand jury despite a grant of immunity pursuant to 18 U.S.C. § 6001 *et seq.* Bail pending appeal of the contempt order was denied by the district court.

The appellant then moved this court for a stay of the order of confinement pending appeal of the contempt order. The issues that the appellant intended to raise on appeal concerned (1) his allegation that the district court has the authority to require the government to conduct a mode of procedures, other than compelled grand jury testimony, in his case and (2) his contention that it is *per se* unlawful to sanction by confinement a 90 year old person for refusing to testify. On December 23, 1987, this court denied the motion for stay.

On December 24, 1987, the district court stayed the order of incarceration upon the representation by the appellant that he would comply with the order to testify before the grand jury on January 6, 1988. The appellant also moved in this court to dismiss his appeal from the contempt order as moot. The appeal was dismissed on December 30, 1987.

On January 6, 1988, the appellant refused to testify before the grand jury and was incarcerated. On January 25, 1988, the appellant moved in the district court for disclosure of documents concerning electronic surveillance, which had previously been submitted to the court *ex parte*. The district court judge held hearings on January 25th and 26th, 1988. The government objected to the disclosure on secrecy grounds. The judge (1) examined the applicable material, (2) concluded that none of the secret information could be successfully deleted or summarized and access to the redacted material granted, and (3) determined that the application and the court order concerning the electronic interception were constitutional and in conformity with the statute. *See In re Lochiatto*, 497 F.2d

803, 808 (1st Cir. 1974).[1] The district court, therefore, denied the motion.[2] The appellant filed a notice of appeal[3] and moved for bail.

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[1] The transcript indicates that the district court at least initially believed that the government merely needed to provide an affidavit stating that no illegal surveillance had occurred. Transcript of January 26, 1988 at pp. 12, 14. In the *Lochiatto* case, this court rejected the government's contention that an affidavit stating that the electronic surveillance was lawful was sufficient to terminate further court inquiry. *In re Lochiatto*, 497 F.2d at 806. We see no significant difference between a claim that no illegal suveillance occurred and a claim that the electronic surveillance which occurred was lawful. The cases which the district court initially relied on are distinguishable. In both *In re Grand Jury Proceedings*, 786 F.2d 3, 6-7 (1st Cir. 1986) and *In re Tse*, 748 F.2d 722, 726-728 (1st Cir. 1984), the government denied knowledge of the existence of electronic surveillance and the issue on review was whether the denial was sufficient to discharge its burden of affirming or denying the occurrence of the alleged unlawful surveillance, pursuant to 18 U.S.C. § 3504. In the present case, the government could not truthfully deny the existence of electronic surveillance and its affidavit that no *illegal* surveillance occurred is no more a sufficient guarantee of lawfulness that was the virtually identical government claim in *Lochiatto*.

[2] Subsequent to the district court's determination that nothing need be provided to the appellant, the government voluntarily provided the appellant with redacted copies of (1) the application for electronic surveillance, (2) the affidavit in support of the court order, and (3) the court order itself. The government also provided an affidavit indicating the length of time the surveillance was conducted. The district court characterized the redacted remains of the material as boilerplate. The government conceded the validity of this characterization. The appellant objected to, and continues to object to, the adequacy of this disclosure.

[3] Although the appellant was appealing the denial of the motion for disclosure, that "appeal" was merely a means to attack the underlying contempt order. *See In re Lochiatto*, 497 F.2d at 806 (a recalcitrant witness may assert, in defense of a contempt proceeding, that the grand jury questioning is based upon information obtained from his communications allegedly intercepted by means of illegal wiretapping.) The appeal of the contempt order, however, was previously withdrawn by the appellant. *See supra* at 2. Arguably, once the district court denied the motion for disclosure, the appellant should have moved in this court for permission to reinstate the appeal from the contempt order and received such permission, before moving for bail pending appeal in the district court. We do not address what implications, if any, arise from the appellant's failure to do so, however, since we construe the appellant's notice of appeal from the district court's denial of the motion to disclose as a motion to reinstate the appeal, which we grant.

The district court believed that an appeal from the denial of the motion for disclosure could not be viewed as frivolous in light of this court's grant of bail pending appeal in a separate, but in the words of the district court judge "related", case, *In re Morris Weinstein*, No. 88-1029. The district court, therefore, granted the appellant bail pending appeal. The government filed a notice of appeal from the grant of bail and moved in this court for an order reversing that grant.

After receipt, in this court, of the transcripts of the district court hearings of January 25th and 26th, we distinguished the situation presented by the appeal in No. 88-1029 and remanded to the district court for reconsideration the question of bail pending appeal in the instant case. We now address the underlying appeal itself.

The district court reviewed the application for a court order authorizing the electronic surveillance, the authorization from the appellate designate of the Attorney General to seek the court order, the affidavits in support of the court order, the court order itself and an affidavit submitted by the government indicating the length of time the surveillance was conducted. Transcript of January 26, 1988 at p. 11. The government having objected to producing any of the documents on the ground of harm due to breach of secrecy, the court considered whether the secret information could be successfully deleted or summarized and access to the excerpted material granted. *Id.* at 12. The court determined that no meaningful redaction was possible and that so much of the material was of a sensitive nature that revelation of any part of it would prejudice the government. *Id.* The court then reviewed the material and determined that the application and the court order were constitutional and in conformity with the statute, 18 U.S.C. § 2518. *Id.* at 12-13. the court concluded, therefore, that none of the documents need be revealed. *Id.* at 13. The government's decision to voluntarily provide the appellant with redacted copies of the material did not, in the

district court's view, alter its disposition since the redaction resulted in the release of boilerplate language, tantamount to the release of nothing. *Id.* at 13-14.

The above-described approach of the district court clearly conforms with this court's dictates in *In re Lochiatto*, 497 F.2d 803, 808 (1st Cir. 1974). This court set forth that approach as the ground rules in balancing the three competing needs — merited secrecy, reasonable expedition, and meaningful defense — and confirmed that the district court is vested with "wide discretion." *Id.* The appellant contends that the redacted copies are insufficient.

First, the appellant points to a discrepancy between the name of the signatory and the typed name on the letter transmitting the authorization of the Assistant Attorney General of the Criminal Division for the application for the court order of interception. (Appendix at 27). We agree with the government that the discrepancy on the transmittal letter is of no matter. The district court must review whether the wiretap application was properly authorized, *i.e.*, by one of the statutorily designated individuals. *See United States* v. *Giordano*, 416 U.S. 505 (1974). The actual authorization, itself, by the Assistant Attorney General of the Criminal Division (App. at 24-25) and the order of the Attorney General designating that Assistant Attorney General as one empowered to authorize applications for court-ordered wiretaps (App. at 28-29) were provided to the district court for review and raise no intimation of impropriety.

Second, the appellant contends that the government should have attempted to summarize the sensitive material. The *Lochiatto* opinion states that "[i]f the government interposes an objection on secrecy grounds, the district court must determine whether the secret information can be successfully deleted or summarized and access to the excerpted material granted." *In re Lochiatto*, 497 F.2d at 808 (citations omitted). We will assume, as the appellant does, that, if summarization

is determined to be appropriate and meaningful, the burden to summarize is on the government and not on the district court. Nonetheless, the district court in this instance determined initially that summarization was not appropriate. Transcript of January 26, 1988 at pp. 12-14. We find nothing in the record which would warrant overturning the district court's wide discretion on this matter.

Having concluded that the district court did not abuse its discretion, *the district court order denying the motion for disclosure of ex parte documents is affirmed.*

IMPOUNDED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

M.B.D. No. 87-586

IN RE:

GRAND JURY PROCEEDINGS

HARRY SAGANSKY, WITNESS

[HANDWRITTEN ORDER ON MOTION
TO STAY ORDER
REVOKING BAIL]

February 8, 1988 — Motion allowed to the extent of staying the order until a physician selected by the government has had a chance to examine the contemnor. The contemnor is directed to coöperate fully in such examination. This order authorizes the government to select a competent physician to perform such an examination. The report of such examination shall be furnished to contemnor's counsel and the Court forthwith and the Court will then consider the matter further on the entire record. William G. Young, U.S.D.J.

IMPOUNDED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

M.B.D. No. 87-586

IN RE:

GRAND JURY PROCEEDINGS

HARRY SAGANSKY, WITNESS

[HANDWRITTEN ORDER ON GOVERNMENT'S RESPONSE TO CONTEMNOR'S MOTION FOR STAY AND COURT'S ORDER]

February 11, 1988 — Upon further review and reflection on the entire record, the Court, agreeing with the argument expressed herein in the Government's Response, orders the contemnor's bail revoked and the contemnor shall either comply with the Court's order or surrender himself to the United States Marshal on or before 12 noon, Friday, February 12, 1988. The Marshal's Service shall cause the contemnor to be hospitalized should it appear to the Service that such hospitalization is necessary. William G. Young, District Court.

FISCHBEIN MEDICAL ASSOCIATES, P.C.
JEROME W. FISCHBEIN, M.D.
BRUCE M. PASTOR, M.D.
MARTIN P. SOLOMON, M.D.
JEFFREY C. BASS, M.D.

1180 BEACON STREET
BROOKLINE, MASS. 02146

TELEPHONE: 734-2433

February 5, 1988

RE: Dr. Harry Sagansky

To Whom It May Concern:

I enclose copies of my office notes concerning Dr. Sagansky documenting an office visit on January 26, 1988, and house calls on January 28, 1988 and February 1, 1988. He was brought directly from prison on January 26th complaining of weakness, lightheadedness and weight loss. He fell in prison and struck his head. On my exam, I noted a marked deterioration in his overall health. He was lethargic, dazed, and listless. His gait was hesitant and awkward. He had been given dalmane while in prison which may have had a cumulative effect in causing his weakness, unsteady gait, and subsequent fall. I was concerned that a head injury in a 90 year old man could have resulted in a subdural hematoma (a collection of blood compressing the brain.)

Laboratory studies demonstrated mild dehydration secondary to lasix therapy and aggravated by his loss of appetite and intolerance to prison food. A head CT was ordered which initially was reported to be suspicious for a subdural hygroma. A subsequent CT yesterday showed significant cortical and frontal lobe atrophy consistent with his age, but showing no sign of a subdural hematoma.

I feel certain that Dr. Sagansky's recent stay in prison caused a definite deterioration in his precarious medical condition. His underlying medical conditions such as brain atrophy, hypothyroidism and fluid retention could lead to a major medical set back if there is any profound change in his environment. While Dr. Sagansky's current condition does not

warrant hospitalization, he does need close medical follow up by the physicians most familiar with his case.

I believe that Dr. Sagansky's recent prison experience caused a dramatic decline in his overall health which has, in part, been reversed within the past week at home. I believe that further exposure to prison will be a clear hazard to Dr. Sagansky's health.

Sincerely,

(s) BRUCE M. PASTOR, M.D.
BRUCE M. PASTOR, M.D.

BMP/BMG
ENC:

FISCHBEIN MEDICAL ASSOCIATES, P.C.
JEROME W. FISCHBEIN, M.D.
BRUCE M. PASTOR, M.D.
MARTIN P. SOLOMON, M.D.
JEFFREY C. BASS, M.D.

1180 BEACON STREET
BROOKLINE, MASS. 02146

TELEPHONE: 734-2433

December 15, 1987

To Whom It May Concern:

RE: Harry Sagansky

This is to certify that Harry Sagansky is under treatment in my office. He has diabetes mellitus and requires a very strict diet to control his blood sugar.

He has severe peripheral vascular disease requiring vasodilators and daily controlled exercise.

He has severe degenerative arthritis with spinal stenosis leading to sciatica which has required hospitalization and prolonged traction. He requires regular physical therapy with traction.

He has endocrinopathy requiring replacement therapy.

He has evidence of a strain pattern in ECG with peripheral edema requiring diuretic therapy.

In view of the multiplicity and seriousness of his medical conditions, it is my opinion that incarceration would certainly have a deleterious effect on his health, and indeed might even prove to be fatal.

Very truly yours,

(s) JEROME W. FISCHBEIN, M.D.
JEROME W. FISCHBEIN, M.D.

JWF/gl

§ 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

(c) Whoever escapes or attempts to escape from the custody of any facility or from any place in which or to which he is confined pursuant to this section or section 4243 of title 18, or whoever rescues or attempts to rescue or instigates, aids, or assists the escape or attempt to escape of such a person, shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both.

Supreme Court of the United States

No. A-659

HARRY SAGANSKY,
APPLICANT,

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the order of the United States Court of Appeals for the First Circuit, case No. 87-1111, entered on February 24, 1988 as well as the order of the United States District Court for the District of Massachusetts, case No. MBD-87-586, entered on February 11, 1988 are stayed pending the filing of a petition for a writ of certiorari in the above-entitled case, provided the petition is filed on or before March 25, 1988. In the event the petition for a writ of certiorari is filed by said date, this order is to continue pending this Court's action on the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

(s) WILLIAM J. BRENNAN, JR.
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

DATED THIS 29TH DAY OF FEBRUARY, 1988.

A TRUE COPY JOSEPH F. SPANIOL, JR.
TEST:
CLERK OF THE SUPREME COURT OF THE UNITED STATES
BY (S)FRANCIS J. LORSON, CHIEF DEPUTY